

NTSB Order No. EA-4817

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 2000

Docket SE-15794

7229

intentionally false statement on an application for airman type rating, in violation of Section 61.59(a)(1) of the Federal Aviation Regulations (FAR), 14 CFR Part 61.² For the reasons that follow, the Administrator's appeal is denied, and the law judge's order dismissing the complaint is affirmed.

Respondent is the holder of an airline transport pilot (ATP) certificate and was, until this matter commenced, the chief corporate pilot for Mandan L.L.C., a company owned by Mr. James Fossett. Mandan holds title to Mr. Fossett's aircraft, and respondent's position required him to maintain the aircraft and transport Mr. Fossett in the aircraft to various business and sporting events. Respondent served as the pilot in command of Mr. Fossett's aircraft for over 500 hours of flight time, during which Fossett served as second in command. During these flights, respondent gave Fossett continuous training and the opportunity to obtain hands-on, practical experience in the operation of his aircraft. Respondent is not the holder of a current certified flight instructor (CFI) certificate, nor has he ever endorsed Fossett's pilot logbook.

During the time period relating to this matter, Mandan

² FAR § 61.59(a)(1) provides:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, authorization, or duplicate thereof, issued under this part....

L.L.C. owned a Falcon 10 aircraft.³ Fossett wished to obtain a type rating in this aircraft, so he contracted with Quality Aviation Training to obtain ground and flight instruction for this rating. James Carey, an FAA-Designated Pilot Examiner (DPE), part owner, and Chief Flight Instructor for Quality Aviation Training, handled the flight training, and his partner Ed Maston, handled the ground school.

Carey planned to give Fossett his check ride in the Falcon 10 aircraft on or about June 12, 1998, after Fossett's completion of the formal instruction. However, after a short time in the aircraft that day, during which Fossett performed instrument approaches, Carey apparently concluded that Fossett was not ready to take his check ride. According to Fossett, Carey suggested that Fossett get more hours of flying experience with respondent, and to then contact him for a new test date. Fossett flew another 150 hours with respondent prior to taking his type rating check ride.

Fossett scheduled his check ride with Carey to take place on or about October 29, 1998. After he and Carey landed the aircraft following the check ride, they entered the lobby of the Monterey Jet Center, where the aircraft was based, and where respondent stood waiting for them. According to both Fossett and respondent, Carey then asked respondent to sign the instructor's recommendation on Fossett's application for rating, FAA Form

³Respondent holds a type rating for the Falcon 10 aircraft.

8710-1.⁴ Respondent asked Carey if he was permitted to do so, and Carey replied that he could because it was he who had flown with Fossett. Respondent then signed the application. Carey instructed respondent to put down his CFI number. Respondent advised Carey that he did not hold a current CFI, and, according to respondent, Carey told him that he could nevertheless sign the form, because he was an ATP.

Respondent testified that at the time he signed the form he believed that it was proper to do so. He explained that his belief was based on: the fact that he had flown hundreds of hours with Fossett, during which he had given Fossett extensive informal instruction; because the regulations, in his view, permitted him to sign; and, because Carey, who was the representative of the Administrator, had said that he could sign. Respondent wrote his ATP certificate number on the application, but he did not put an expiration date down, because an ATP is issued without an expiration date. Respondent testified that he never intended to give a flight instructor endorsement. "It's an ATP endorsement." (TR 110).

Unbeknownst to respondent and Fossett, Carey did not have the FAA's permission, nor had he requested permission from his local Flight Standards District Office, to both train *and* test

⁴The top of the second page of FAA Form 8710-1 contains a section entitled "Instructor's Recommendation." It states, "I have personally instructed the applicant and consider this person ready to take the test."

pilots. Had Carey signed the instructor's recommendation, the application for type rating would have been rejected. Had the instructor's recommendation been left blank, however, the application would not have been rejected because an instructor's recommendation was unnecessary. In any event, respondent's signature on the FAA Form 8710-1 was questioned because of an investigation of James Carey that has since resulted in, among other things, his de-designation as a pilot examiner.⁵ The FAA investigator-in-charge testified that even though the instructor's recommendation was not required, if one was there he would have considered it in his decision on whether to accept or reject the application.

The law judge determined that respondent did not intentionally falsify the FAA Form 8710-1. He found that the evidence was clear that respondent had, in fact, personally instructed Fossett, so that respondent's statement to that effect was neither false nor misleading.⁶ Moreover, in the law judge's opinion, the FAA Form 8710-1 did not specifically require the signature of a CFI, and respondent never held himself out to be a CFI.

In order to establish the allegation of intentional

⁵The investigation of Carey has resulted in several FAA enforcement actions now before the Board.

⁶And, we think, since Carey had actually directed Fossett to get more experience with respondent before he attempted a check ride, respondent truly was in a position to say whether Fossett was ready for that test.

falsification, it was the Administrator's burden to prove that respondent made a false statement, that he made it with knowledge of its falsity, and that the statement he made was in reference to a material fact. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). If the evidence fails to support any one of these elements, the allegation must fail. Since the law judge found, as a matter of credibility, that respondent did not falsify the form, his dismissal of the complaint must be upheld absent some compelling basis for the Board to conclude that his credibility determination was arbitrary, capricious, or otherwise deficient. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).⁷

The Administrator would have us overturn the law judge's findings because, in her opinion, it is inherently incredible that respondent would not know that *only* a CFI could sign an endorsement on the FAA Form 8710-1. We disagree. As the law judge notes, nowhere on the form does the term "certified flight instructor" appear, nor is there evidence that respondent held himself out as a CFI. Nor are we persuaded by the Administrator's assertion that her regulations cast overwhelming doubt upon respondent's claim to have believed Carey's assertion that he could attest to Fossett's readiness for a check ride.

⁷The law judge found that respondent's statement was not material because of the investigator-in-charge's testimony that an instructor's recommendation was not required. Although not determinative of the outcome here, we do not agree with this finding. For a statement to be material, it need only be capable of influencing the decision of the agency in making a required determination. Twomey v. NTSB, 821 F. 2d 63, 66 (1st Cir. 1987).

FAR § 61.167(b), cited by the Administrator, provides,

§ 61.167 Privileges....

(b) An airline transport pilot may instruct-

(1) Other pilots in air transportation service in aircraft of the category, class, and type, as applicable, for which the airline transport pilot is rated and endorse the logbook or other training record of the person to whom training has been given....

Since we are unable to discern from this record whether Mandan's operations are encompassed by the term "air transportation service,"⁸ and since the Administrator is unable to direct us to a definition of that specific term, we cannot agree with the Administrator that respondent knew or should have known as much. In any event, what respondent should have known is not the issue, see, e.g., Administrator v. Juliao, 7 NTSB 94, 95-96 (1990). The law judge's credibility determination in respondent's favor includes an implicit finding that respondent did not have actual knowledge that he could not sign the form as an ATP. The Administrator offers us no compelling reason to overturn that finding, which was fatal to her allegation of intentional falsification.

⁸The law judge found that at the time of the endorsement both respondent and Fossett were qualified as pilots of the Falcon 10 on the FAR Part 135 operating certificate of a charter operation that apparently leased back the aircraft from Mandan.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's initial decision is affirmed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.